

Supreme Court, U. S.
FILED

AUG 12 1976

MICHAEL RÓDAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-206

LENA ROSA K. CONLEY,
Petitioner,

v.

ESSIE B. SAWYER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LENA ROSA K. CONLEY,
300 W. 35th Street
Post Office Box 6092,
Norfolk, Virginia 23508,
pro se.

Phone:
804-622-4951.

August 12, 1976.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

LENA ROSA K. CONLEY,
Petitioner,

v.

ESSIE B. SAWYER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

To the Chief Justice and the Associate
Justices of the Supreme Court of the
United States:

Your petitioner, Lena Rosa K. Conley,
respectfully prays that a writ of certio-
rari issue to review the decision of the
United States Court of Appeals for the
Fourth Circuit of July 12, 1976.

OPINION BELOW

The United States District Court for
the Eastern District of Virginia granted
judgment for the defendant (C/A 75-367-N)
on November 6, 1975.

The District Court's Order appears
as Appendix A-21.

The United States Court of Appeals for the Fourth Circuit affirmed judgment of the District Court in No. 76-1078 (C/A 75-367-N) on July 12, 1976.

The Court of Appeals' judgment appears as Appendix A-25.

JURISDICTION

As grounds on which to invoke jurisdiction of this Court, petitioner relies upon Title 28, United States Code, Section 1254, and alleges and verily believes that the special and important reason justifying a grant of review on writ of certiorari in the sound judicial discretion of this Court within the meaning of Rule 19 of the Rules of this Court, is that the opinion of the court below decides an important question of federal law which has not been, but should be, settled by this Court.

QUESTION PRESENTED FOR REVIEW

Whether a government employee may place in another employee's file, false and derogatory statements, alleged to have been overheard at a meeting two years before, reports of which meeting did not exist, according to the Vice Commander, Naval Supply Systems Command, and after assurances from the Commanding Officer of the agency that no such derogatory remarks were in the record.

STATUTE INVOLVED

Title 5, United States Code, Section 702: Right of review. A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within

the meaning of a relevant statute, is entitled to judicial review thereof.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment

"No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

STATEMENT OF THE CASE

Due process and equal justice under the law has been denied petitioner each step taken to clear her record, without being able to secure any legal assistance.

Government representatives have given her false information or denied information, then claimed she has not shown "due diligence" in seeking information.

When nothing adverse could be found in her record (to submit to the court), government representatives have not hesitated to invent and place something adverse there, as outlined in her Motion for Judgment, Appendix A-1 - A-4.

Petitioner first received a copy of the false and defamatory statement (Appendix A-5) by Respondent Essie B. Sawyer on April 10, 1975, in an administrative record forwarded by J. Brian Donnelly, Assistant United States Attorney, who refused to tell her when he had received it and could keep it from her no longer.

No date appeared on the statement, but it followed a second assurance from the Commanding Officer, Naval Supply Center,

Norfolk, dated February 20, 1974, to petitioner that:

"I can assure you that your personnel record does not contain any derogatory remarks."

Respondent Sawyer's statement apparently was written after February 20, 1974, and before April 15, 1974, the next dated item. She wrote it almost two and one-half years after the meeting described. There is no indication she had any duty to be present at the meeting.

Respondent Sawyer contradicts statement of August 15, 1973, made by Rear Admiral C. Becker, SC, USN, Vice Commander, Naval Supply Systems Command, Department of the Navy, Washington, D. C. 20376, that:

"The three reports of meetings requested by Mrs. Conley do not exist. Any information concerning or deriving from these meetings has already been provided to Mrs. Conley in the form of written or oral responses to inquiries or complaints presented by her."

Admiral Becker's information was furnished petitioner August 17, 1973, by her Congressman, whose help had been requested in securing reports of this and other meetings concerning her.

Respondent Sawyer evidently was in collusion with another in making up and inserting into the administrative record defamatory remarks as shown by the comparison appearing at A-8 and A-9.

Petitioner to the best of her ability responded to citations in her motions, Appendix A-6 - A-11 and A-12 - A-16.

The District Judge at Appendix A-19 infers petitioner's suits illustrate the need for a policy of immunity, but indications are more suits are needed to "dampen the ardor" of those who would make up false and defamatory statements and to curb "the most irresponsible" who are not acting in the "unflinching discharge of their duties" but trampling on Constitutional rights.

A recent news item in SOUNDINGS for July 15, 1976, Appendix A-26 and A-27, shows the danger that "Some unknown remark . . . has come back to haunt many an employee." Here, remarks made not by a former supervisor and not by a past employer, have been made by an individual who never actually knew petitioner, apparently for the purpose of casting discredit upon her. Such action was clearly beyond the scope and protection of privilege, qualified or otherwise.

REASONS FOR GRANTING WRIT

Petitioner believes Respondent Sawyer was not acting within the scope of her duties and that such irresponsible conduct needs to be restrained. "It may well be that the immunity doctrine has now been extended too far." Petitioner has suffered immeasurably and her record should be cleared so that she might be appropriately reinstated.

CONCLUSION

Wherefore, the premises considered, petitioner believes there are special and important reasons justifying grant of a writ of certiorari in her case.

Respectfully submitted,

Sandra Rosa K. Conley

CERTIFICATE OF SERVICE

I hereby certify that three printed copies of the Petition for a Writ of Certiorari are being delivered to the office of:

The Solicitor General,
Department of Justice,
Washington, D. C. 20530.

Lena Rosa K. Conley

Lena Rosa K. Conley,

pro se.

August 12, 1976.

APPENDIX

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

LENA ROSA K. CONLEY

300 W. 35th Street

P. O. Box 6092

Norfolk, Va. 23508

L 75-1194

Filed

Plaintiff

v.

June 30, 1975

ESSIE B. SAWYER

3349 Loam Street

Norfolk, Va. 23518

Defendant

M O T I O N F O R J U D G M E N T

1. This action for libel is instituted under the Code of Virginia Section 8-630, Action for insulting words, by the plaintiff, Lena Rosa K. Conley, Clerk-Stenographer, GS-4, formerly assigned to Pier 3, Water Freight Division, Freight Terminal Department, Naval Supply Center, Norfolk, Virginia 23512, against the defendant, Essie B. Sawyer, Secretary to the Personnel Officer, to recover compensatory and punitive damages for the attached statement forwarded as part of the plaintiff's administrative record at the Naval Supply Center to her by J. Brian Donnelly, Assistant United States Attorney, on April 8, 1975, said statement containing false and libelous statements clearly disproportionate, extraneous and impertinent and beyond the scope and protection of privilege, qualified or otherwise, and conveyed to the readers and imputed to the plaintiff unfitness to perform the duties of her employment in an outstanding manner and a want of moral character and professional and business integrity, and those statements tend to hold her in public ridicule and contempt and prejudice the plaintiff in her professional and social

reputation, relationships, and standing in the community and consequent mental suffering, insult and loss of income. Such statements were not required in the performance of defendant's duties and expressly contradicted the statement of the Commanding Officer, Naval Supply Center, Norfolk, on August 16, 1973, that "nothing adverse appears in your personnel records relative to your conduct or behavior while employed at this activity."

2. Defendant Sawyer states that plaintiff "had been complaining about obtaining a career appointment" which is a malicious falsehood when one considers that plaintiff had been led to believe on July 9, 1971, that she was being reinstated as a career, displaced employee to fill a permanent, established position, on July 12, 1971, a position which the Director, Freight Terminal Department, described on April 13, 1973, as inconvenient to the Water Freight Division and additional cost to the government to fill with a temporary employee; plaintiff was told by L. C. Smith a few days after entrance upon duty that the promised permanent appointment would be effected upon receipt of her file from Washington and asked plaintiff if she would agree to continue on a temporary basis until receipt of the file, and plaintiff agreed, although this meant foregoing benefits of retirement deductions and credit, life insurance, and health coverage in the interim, and believes her concern about the undue delay of six months in effecting permanent status was a diligent use of administrative remedies. Plaintiff believes that Defendant Sawyer must specify when and how "personal problems" interfered with work and supply source and instances in which plaintiff tended to be "erratic and flighty" if

these were not falsehoods without any foundation whatsoever. Plaintiff further believes that Defendant Sawyer had no right to state plaintiff "had peculiar ways" without specifically stating particulars, if this was not a malicious statement not required in the course of Defendant Sawyer's duties and beyond their perimeter.

3. Having served as Secretary among others for an Admiral and an Ambassador, plaintiff can think of no occasion when her duties would have required her to make a statement several years after a conference that during it unknown persons made derogatory and insulting remarks to the effect that an individual had been "complaining" years previously, had personal problems, "tended to be erratic and flighty" and that the individual was "exacting about procedures, but had peculiar ways occasionally." To supply a statement beyond the fact that a permanent appointment had been recommended and that a salary adjustment was made from Step 1 to Step 4 of plaintiff's grade in consideration of previous employment in a position comparable to that of GS-5, Step 10, Secretary and/or FSS-8, Step 7, Secretary, \$7,041 per annum, was clearly disproportionate, extraneous and impertinent and beyond the scope and protection of privilege, qualified or otherwise.

4. Plaintiff believes that her oath of office and requirement of the Code of Ethics for Government Service to "expose corruption wherever discovered" requires her to institute this suit to prevent further abuse and uncontrolled discretion and violation of the rights of individuals.

WHEREFORE, the plaintiff moves the Court for judgment against Defendant Essie B. Sawyer in the sum of \$50,000.00 compensatory damages and in the further sum of \$50,000.00 punitive damages.

LENA ROSA K. CONLEY
pro se

LENA ROSA K. CONLEY
300 W. 35th Street
P. O. Box 6092
Norfolk, Va. 23508
Telephone 622-4951

Statement of Mrs. Essie B. Sawyer, 3349 Loam Street, Norfolk, Virginia 23518, who is secretary to the Personnel Officer.

1. Q - Provide a statement regarding a December 1971 meeting regarding Mrs. Lena Rosa K. Conley.

A - A meeting was held in Mr. Ernest A. Morgan's office. There was an officer from the Freight Terminal Department -- I think it was LCDR Smith. Mrs. Conley had been complaining about obtaining a career appointment. We asked various supervisors and co-workers their opinions about Mrs. Conley's performance. The response was her work performance was fine. The general gist of the answers was that she had personal problems and tended to be erratic and flighty; that she was a hard worker and was exacting about procedures, but had peculiar ways occasionally. We recommended that she should be given a permanent appointment.

/s/ Essie B. Sawyer
ESSIE B. SAWYER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LENA ROSA K. CONLEY
300 W. 35th Street
P. O. Box 6092
Norfolk, Va. 23508
Plaintiff

vs.

LERROY W. POWERS L-75-1270 now
Moyock, North Carolina 27958 CA-75-410-N

ESSIE B. SAWYER L-75-1194 now
3349 Loam Street CA-75-367-N
Norfolk, Va. 23518
Defendants

MOTION TO AMEND ORIGINAL MOTIONS FOR
JUDGMENT, COMBINE, AND ADD DEFENDANTS
CIVIL SERVICE COMMISSION AND NAVAL SUPPLY
CENTER

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." "...to prevent irreparable injury, the reviewing court...may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." (Pub.L.89-554, 9/6/66, 80 Stat.392,393)

Plaintiff respectfully requests addition of Defendants Civil Service Commission and Naval Supply Center for information to clarify conflicting and apparently false statements of Defendants Powers and Sawyer in administrative file submitted to the Court, copy of which was received by plaintiff April 10, 1975. Plaintiff requests the

Court to direct reinstatement at least in a Leave Without Pay status pending final decision on performance rating appeal hearing, CA-74-100-N, now No. 75-1673, in the Fourth Circuit Court of Appeals, and appeal with respect to Contested CSA-1 002 105, CA-74-654, now No. 75-1057 in the District of Columbia Court of Appeals.

Precedent for reinstatement status was set by U. S. Treasury checks issued in October 1970 for retroactive annuity to October 12, 1966, as confirmed by the letter of November 3, 1970, from Jack Goldberg, Chief, Claims Division, Bureau of Retirement, Insurance, and Occupational Health, United States Civil Service Commission. (Mr. Nicholas J. Oganovic, Executive Director, U. S. Civil Service Commission, Washington, D. C. 20415, confirmed on February 6, 1970, that Lena Rosa K. Conley last occupied the position of Secretary, FSS-8, Step 7, at a salary of \$7,041.00 (current rate then \$8,239.00)).

Scott v. Macy, 349 F.2d 182 (1965), reasons that "the Constitution does not distinguish between applicants and employees ...(I)t does not at all follow that because the Constitution does not guarantee a right to public employment (it) may resort to any scheme for keeping people out of such employment." When letter of August 2, 1971, from the Commission's Bureau of Retirement, Insurance, and Occupational Health directed reinstatement of health benefits, the Naval Supply Center was put on notice to transfer this enrollment back to that office. When Defendant Powers found plaintiff "emotionally upset" at the Dispensary as he claims, he was obliged to recommend sick leave, secure medical statements, and if appropriate re-assignment was impossible, reinstate annuity.

The "irrefragable evidence" test of Knotts v. United States, 121 F.Supp. 630, 128 Ct.Cl. 489, 492 (1954), referred to in McGlasson v. United States, 397 F.2d 303 (1968), that officials may not have acted in good faith, is found in the copy of the administrative record in Conley v. Hampton, CA-74-100-N, received on April 10, 1975, from J. Brian Donnelly, Assistant United States Attorney. Page 105 of the record appears to be letter of February 20, 1974, from V. A. Lascara, Rear Admiral, SC, USN, Commanding Officer, Naval Supply Center, who states: "I can assure you that your personnel record does not contain any derogatory remarks." A comparison of statements made on pages 75, 107, and 109 follows:

By Mrs. Essie B. Sawyer
3349 Loam Street
Norfolk, Va. 23518

By Leroy W. Powers
Moyock
North Carolina 27958

"A meeting was held in Mr. Ernest A. Morgan's office."

"I was called to a meeting in Mr. Ernest A. Morgan's office."

"Mrs. Conley had been complaining about obtaining a career appointment."

"Mrs. Conley told me that her sole purpose in being here (NSC) was to get the matter of the Civil Service Commission straightened out."

"We asked various supervisors and co-workers their opinions about Mrs. Conley's performance."

"...asked about Mrs. Conley's performance..."

"The response was her performance was fine."

"her performance was satisfactory"

"The general gist of the answers was that she

"She had personal problems with her

had personal problems." brother and a previous disability retirement..."

"...and tended to be erratic and flighty..."

"I advised her that she should accept things and place them in priority and not get uptight and flighty."

"...that she was a hard worker and was exacting about procedures, but had peculiar ways occasionally..."

"Mrs. Conley appeared to be unstable...times when ..better than others. She then appeared stable..."

"We recommended that she should be given a permanent appointment."

"...but I personally would not have hired her as a permanent employee. However, in view of the policy to give Civil Service employees the benefit of the doubt and be compassionate, I would recommend retention."

Reporting derogatory information was encouraged and rewarded, much like that referred to in news item concerning FBI agents lent to congressional staffs (Virginian-Pilot, October 14, 1975), though "Some men would not do it. They had scruples, and they just didn't hear derogatory information. As a result, some (of the agents) would be withdrawn."

Scott v. Macy, 349 F.2d 182 (1965) states "Appellant's right to be free from governmental defamation requires that the Government justify the necessity for imposing the stigma of disqualification." It is important to know when the above remarks were put in the record and by what

authority or under what scope of duties.

Scott v. Macy continues: "Appellant is an applicant for public employment, and thus may have less statutory protection against exclusion than an employee. But he is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government. The Executive may have discretion in hiring or firing, but '(d)iscretionary power does not carry with it the right to its arbitrary exercise.'"

"The legal process appears lengthy and, particularly if the case is ultimately appealed in court, expensive. Meanwhile the employee would be out of a job and the psychological pressures will be great." This is part of the discussion in THE SPOILED SYSTEM, A CALL FOR CIVIL SERVICE REFORM by Robert Vaughn, concerning coerced resignations, "It is also proper for the agency in the course of the discussion to advise the employee which of the possible alternatives will be in his best interests.. However, if the agency uses deception, duress, time pressure, or intimidation to force him to choose a particular course of action, the action is involuntary" quoting F.P.M. Supplement SI-1a(3), on pages II-14 and II-15.

Plaintiff begs the Court to consider whether her constitutional rights to "equal justice under the law," "due process," etc., have been violated.

Plaintiff respectfully urges the Court to deny Defendants' Motions to Dismiss.

make some effort to insure that plaintiff has "equal" legal assistance, and examine the case for appropriate reconsideration under the applicable statutes, regulations, and the Constitution of the United States.

LENA ROSA K. CONLEY

I hereby certify that a copy of the foregoing motion was this day served on defendants by delivering a copy to Roger T. Williams, Assistant United States Attorney, Norfolk, Virginia.

LENA ROSA K. CONLEY

OCTOBER 17, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LENA ROSA K. CONLEY,
Plaintiff,

vs.

ESSIE B. SAWYER,
Defendant.

CIVIL ACTION
NO. 75-367-N

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

Now comes the plaintiff respectfully praying that Court retain jurisdiction, find defendant not protected by immunity for illegal acts not authorized outside performance of official duties, and issue an injunction to prevent defendant's employers from further derogatory activity toward plaintiff .. rather direct reinstatement with removal of all derogatory defamatory matter from her records.

A careful review of the eight citations in Roger T. Williams' Memorandum of November 22, 1974, finds none applicable to unauthorized, defamatory statements by defendant, a secretary who never met plaintiff; they were not mandatory, discretionary, or in any way required by the scope of duties. Rather than an official involved with official matters, here is a secretary putting into an administrative record words overheard years before! Chafin v. Pratt, 358 F.2d 349 (1966), admits misgivings in like suits and that "we are not writing on a clean slate" calling attention to Judge Learned Hand's statement in Gregoire v. Biddle, 177 F.2d 579, that "it may well be that the immunity doctrine has now been extended too far." To review Mr. Williams' citations:

Barr v. Matteo involved an Acting Director of Rent Stabilization and a Deputy

Director in Charge of Personnel and Fiscal Matters and a Chief of Personnel Branch. In 1957 the District Court held action was not absolutely privileged and Director liable. In 1958 this was reversed and remanded for question of qualified privilege. In 1959 the Supreme Court held plea of absolute privilege in defense of alleged libel must be sustained, but Mr. Chief Justice Warren, Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Stewart entered lengthy dissents!

Howard v. Lyons involved a Navy Captain and the National Commander, Federal Employees Veterans Association, Inc., a civilian employee at Boston Naval Shipyard. The District Court granted judgment, Appeals reversed, and Supreme Court held privilege sustained, but Mr. Chief Justice Warren and Mr. Justice Douglas dissented, feeling burden of proof on defendant to sustain and no mandatory duty involved.

Frommhamen v. Glazer refers to dissenting opinion of Chief Justice Warren in Barr and involved a scientist and a chief counsel and memorandum to proper persons within NASA.

Urbina v. Gilfilen involves alleged libel about false claims for reimbursement of quarters allowance.

In Preble, the Director of new Maintenance Control Program was demoted from GS-10 to GS-5, after his grievance, and statements requested and delivered to Chairman of Grievance Committee were considered appropriate to exercise of utterer's office or station; attention is called to "delicate balance" between protection from "irresponsible conduct" and freedom of official action, Preble refers to Alaniz

v. U.S., 257 F.2d 108, which warns rule of summary judgment is not intended to provide a substitute for regular trial of cases with disputed issues of fact upon which outcome of litigation turns, and should be invoked with caution. Alaniz refers to Purity Cheese Co. v. Frank Ryser Co., 153 F.2d 88, which urges liberal construction in favor of party opposing motion because "the hands of a party invoking aid of equity court are presumed to be clean until the contrary appears."

Ruderer v. Meyer involves a group chief and reminds us four Justices dissented in Barr and three in Howard, and "the Chief Justice, whom Mr. Justice Douglas joined, was concerned, in dissent, about extending immunity to public statements of lesser officials."

Pagano, under confused circumstances, denied redress, by District Judge Kellam, for libel whereby superiors substituted an unfavorable report for a good rating after emergency leave because of wife's health, as affirmed by Court of Appeals in 1968.

Berendtson v. Lewis concerns a Navy Captain and a District Judge in the Arnheiter case and points out "it is not the title of office but duties with which entrusted--the relation of alleged libel to matters committed by law to control or supervision" as shown in Spalding v. Vilas, 1896, 161 U.S. 483, 16 S.Ct. 631, 40 L Ed 780, which at page 498 states "...we recognize the distinction between action taken by the head of a department in reference to matters which are manifestly or palpably beyond his authority..."

The fact that the Assistant United States Attorney had to cite so many cases is proof of the inexact nature of immunity and the need for careful scrutiny in each individual situation, and necessity for Court to take jurisdiction to restrain "irresponsible conduct."

Colpoys v. Gates, 118 F.2d 16 (1941), resulted in District Court denying United States Marshal's motion to dismiss complaint since it appeared he was not acting within scope of official authority and had no public duty to act and knowingly broadcast false statements, more comparable to the case at bar.

Kelley v. Dunne, 344 F.2d 129 (1965), claims "there would be no serious hamstringing of the activities of postal inspectors if, in the absence of a warrant, they were, to some extent, to defend their actions."

Hughes v. Johnson, 305 F.2d 67 (1962), was reversed and remanded as it was felt a search did not fall within scope of official duties.

Defendant Sawyer and her superiors should have the burden to prove that the defense of privilege should be sustained in this case. They should be required to show the date the statement was placed in an official administrative file and what mandatory duty was thereby fulfilled. Plaintiff believes there was no mandatory duty and the activity is expressly forbidden by statute, regulation, and Constitution.

Plaintiff respectfully prays for full disclosure of facts which will show

immunity cannot be extended so far and that the Court retain jurisdiction and direct Defendant's superiors to provide appropriate relief in the premises.

LENA ROSA K. CONLEY

I hereby certify that a copy of the foregoing motion was this date served on defendant by delivering a copy to the office of Roger T. Williams, Assistant United States Attorney.

LENA ROSA K. CONLEY

October 23, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

LENA ROSA K. CONLEY,)	
Plaintiff,)	
v.)	CIVIL ACTION
ESSIE B. SAWYER,)	NO. 75-367-N
Defendant.)	

LENA ROSA K. CONLEY,)	
Plaintiff,)	
v.)	CIVIL ACTION
BRIAN W. BOWLER,)	NO. 75-368-N
ROBERT E. RISINGER,)	
Defendants.)	

LENA ROSA K. CONLEY,)	
Plaintiff,)	
v.)	CIVIL ACTION
LEROY W. POWERS,)	NO. 75-410-N
Defendant.)	

MEMORANDUM ORDER

Plaintiff has filed pro se complaints against various employees and officers of the United States government who have been connected with her evaluation as a Civil Service employee. Each complaint here arises out of the same facts and circumstances which were dealt with at length in Memorandum Opinions and Orders of February 3, 1975, Conley v. Hampton, C/A 74-100-N, 74-236-N, 74-449-N, 74-450-N (E.D. Va.1975), and of May 1, 1975, Conley v. Hampton, C/A 74-100-N, 74-449-N, 74-575-N (E.D. Va.1975).

Plaintiff initiated these actions by filing motions for judgment against the named defendants in the Circuit Court of the City of Norfolk, Virginia. The United

States removed them to this Court pursuant to 28 U.S.C. § 1442(a).

In C/A 75-367-N, plaintiff seeks damages from Mrs. Essie B. Sawyer, secretary to the Personnel Officer at the Naval Supply Center. In C/A 75-368-N, plaintiff seeks damages from Mr. Brian W. Bowler, who was the department representative on the Performance Rating Board of Review which reviewed plaintiff's 1973 performance rating; plaintiff also seeks damages from Commander R. E. Risinger, USN (SC), the director of the Water Freight Division of the Naval Supply Center, who initially reviewed her performance rating in 1973. Plaintiff claims that the statements which defendants made in the course of the administrative review of her performance evaluation were libelous and thus actionable under the Virginia insulting words statute, Va. Code Ann. § 8-630, and that there were made outside the "scope and protection of privilege."

The matters are now before the Court upon motions of the defendants for dismissal or, alternatively, summary judgment. Assuming that the statements of defendants were libellous, an assumption which appears tenuous at best, it is clear from plaintiff's pleadings and exhibits, as well as defendants' answers, that any statements made by the defendants were made within the scope of their duties and the Court so finds. Such statements, made by government employees acting within the scope of their duties, are accorded an absolute privilege from civil defamation suits. Barr v. Matteo, 360 U.S. 564, 574 (1959); see Memorandum Opinions and Orders of February 3, 1975, and May 1, 1975, supra. Indeed the

present suits illustrate the need for the policy of according government officials and employees an immunity from defamation suits. The plaintiff here has instituted nine suits against thirteen different individuals. Three suits terminated in summary judgments for the defendants and three were dismissed. Two of the summary judgments (C/A 74-236-N and C/A 74-432-N) and one dismissal (C/A 74-575-N) were based upon the immunity sustained in Barr. A fourth suit was dismissed on the basis of legislative immunity (C/A 74-450-N). Plaintiff then turned to the state courts, again selecting as defendants people who had been involved in her Civil Service performance rating and rating review process but whom she had previously sued in her earlier claims in Federal Court. To submit public officials to frequent trials to determine the validity of such complaints would, as Judge Learned Hand observed in the Gregoire case, "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). It appears from plaintiff's exhibits that the defendants were in fact quite solicitous of plaintiff, not only according her due process but affording her every opportunity to continue her government employment.

Finding that there are no genuine issues as to any material facts and that the defendants are entitled to judgment as a matter of law, Fed.R.Civ.P. 56(c), it is ORDERED that summary judgment be entered for the defendants in C/A 75-367-N, C/A 75-368-N, and C/A 75-410-N.

Copy of this Memorandum Order is forwarded to the United States Attorney for

this District and to plaintiff.

/s/ Richard B. Kellam

United States District Judge

Norfolk, Virginia

November 5, 1975.

A-20

JUDGMENT ON DECISION BY THE COURT
CIV 32 (7-63)

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Civil Action File No.75-367-N

Lena Rosa K. Conley)
 vs.)
Essie B. Sawyer)
-----))

JUDGMENT

This action came on for hearing before the Court, Honorable RICHARD B. KELLAM, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that summary judgment is entered for the defendant and case is dismissed on the merits.

Dated at Norfolk, Virginia, this 6th day of November, 1975.

W. FARLEY POWERS, JR.
Clerk of Court
/s/ Dorothy K. Johnson
By Dorothy K. Johnson
Deputy Clerk

A TRUE COPY, TESTE:
W. Farley Powers, Jr., Clerk
By /s/ Dorothy K. Johnson
Deputy Clerk

A-21

Official Court Reporter
United States District Court
Eastern District of Virginia

CHARLES E. BARNES
402 Federal Building
Norfolk, Virginia 23510

December 22, 1975

Mrs. Lena Rosa K. Conley
300 W. 35th Street
P. O. Box 6092
Norfolk, Virginia 23508

RE: Lena Rosa K. Conley v. Essie B.
Sawyer, Civil Action No. 75-367-N

Dear Mrs. Conley:

This will acknowledge receipt of your letter
of December 15th.

I have checked through my Stenotype notes
and cannot find any notes taken in this case.
In addition, the file in the Clerk's Office
reveals that no formal hearing was had in
this matter.

My Stenotype notes are filed datewise. If
you can supply me with the date on which
you believe the Court may have had a hearing
in this case, I will be glad to check further
for any notes I may have pertaining to this
case.

Sincerely yours,

/s/ Charles E. Barnes
Charles E. Barnes

A-22

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 76-1078

LENA ROSA K. CONLEY,
Appellant,
vs.
ESSIE B. SAWYER, Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia -
At Norfolk

Now comes the appellee, Essie B.
Sawyer, by Roger T. Williams, Assistant
United States Attorney for the Eastern Dis-
trict of Virginia, and respectfully moves
this Honorable Court to dismiss the appeal
filed herein, or in the alternative, to
affirm the judgment of the District Court
summarily for the reasons set forth in the
memorandum order of the District Court
filed on November 5, 1975.

ESSIE B. SAWYER

BY: _____
Robert T. Williams
Assistant United States Attorney

I hereby certify that a copy of the
foregoing motion was this day served on
Ms. Lena Rosa K. Conley, appellee herein,
300 W. 35th Street, Norfolk, Virginia 23508,
by mailing the same to her addressed as
above.

Assistant United States Attorney

February 18, 1976.

A-23

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
NO. 76-1078

LENA ROSA K. CONLEY, Appellant,
vs.
ESSIE B. SAWYER, Appellee.

Appeal from the United States District Court
for the Eastern District of Virginia
- At Norfolk

Now comes the appellant respectfully
to move this Honorable Court to deny
appellee's motion of February 18, 1976,
and that appellant be given the hearing
promised by the essentials of fair proce-
dure. Actions by the lower court and
Assistant United States Attorney "consti-
tute a denial of fundamental fairness,
shocking to the universal sense of
justice."

LENA ROSA K. CONLEY,
pro se.

I hereby certify that a copy of the
foregoing was this day served on Essie B.
Sawyer, appellee, by mailing a copy to
Roger T. Williams, Assistant United States
Attorney, Norfolk, Virginia 23501.

LENA ROSA K. CONLEY,
pro se.

February 25, 1976.

A-24

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1825
Lena Rosa K. Conley, Appellant,
-versus-

Frances M. Wilson, Executive
Director, Bureau of Economic
and Business Affairs, United
States Department of State, etc., Appellee.

No. 76-1078
Lena Rosa K. Conley, Appellant,
-versus-
Essie B. Sawyer, Appellee.

Appeals from the United States District
Court for the Eastern District of Virginia,
at Norfolk. Richard B. Kellam, District
Judge.

Submitted: February 25, 1976.

Decided: July 12, 1976

Before RUSSELL, FIELD and WIDENER, Circuit
Judges.

Lena Rosa K. Conley, Pro Se, Appellant;
Roger T. Williams, Assistant United States
Attorney, for Appellees.

PER CURIAM:

These are libel actions brought
by Lena Rosa K. Conley, a former employee
of the Naval Supply Center at Norfolk,
against a State Department Official and the
secretary to the Personnel Officer of the
Naval Supply Center. An examination of the
record reveals that the allegedly libelous
statements were clearly in the line of the
defendants' duty, and thus enjoy absolute
immunity. Barr v. Matteo (1959) 360 U.S.
564, 575.

The judgments of the District Court are
AFFIRMED.

A-25

Spare folder

SOUNDINGS, July 15, 1976

4

can save job

Here's some good advice to federal employees that could save their jobs or their next promotion.

It's offered by Vincent Connery, president of the National Treasury Employees Union, and concerns government employee personnel files.

Connery notes that as a result of the Freedom of Information and Right to Privacy Acts, federal employees not only have the right to review and copy their personnel folders, they can also amend any outdated or incorrect information found in them.

Connery said that over the years he has seen the careers of far too many people in government shattered because of wrongful information contained in these once highly secretive folders.

"Some unknown remark of a former supervisor, a past employer, or an irate neighbor has come back to haunt many an employee," Connery said. "You never know what's in your personal folder until you review it. It costs you nothing and it could possibly save your job or your next promotion."

Connery offers this advice to all federal employees:

Get a copy of your folder, which your personnel office must furnish you, and take it home for safe-keeping. Then, every year or so, request another copy so you can keep your files current.

You are entitled to review and obtain copies of all information in your folder except medical information that a "prudent

physician" would hesitate to disclose, investigative reports obtained under a promise of confidentiality, and data which pertains to national defense.

To obtain a copy of your personnel folder you simply take the following steps:

Make a request in writing to your personnel office. Write "Privacy Act inquiry" on the front of the envelope and the top of the letter.

Include your name, address, social security number, job title, post-of-duty, and other information useful in verifying your identity such as birth date and place. You should also include in the letter a statement to the effect that you wish to be furnished a copy of your complete personnel folder pursuant to the regulations implementing the Right to Privacy Act and the Freedom of Information Act.

Upon receipt of your request, the personnel office must respond within 10 days and must permit you to review and copy the folder within 30 days. There is normally no charge to receive or to make a copy of your folder.

Spare folder (Continued)
Article from
can save job SOUNDINGS,
July 15, 1976

—If, for some reason, you are denied access to your folder, you must be notified of the reasons for the denial and told of your right to appeal to the Civil Service Commission.

Once you have reviewed the folder and, if you wish to correct or amend any information, you should take the following steps:

—Send a letter to the personnel office with "Privacy Act Request" marked on both the envelope and the letter. In the letter, you must specifically identify the material to be changed and the exact wording that will replace it.

—Mail or hand deliver the letter to the personnel office and keep a copy for yourself.

You must receive a response to your request within 10 days. If your request is approved, you will receive a corrected copy of your personnel record and the personnel office must notify all persons and agencies who have received the file of the correction or change.

If your request for correction is denied, you can appeal to the Civil Service Commission within 30 days of the denial.

Nos. 76-206 and 76-381

Supreme Court, U. S.
FILED
NOV 19 1976

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

LENA ROSA K. CONLEY, PETITIONER

v.

ESSIE B. SAWYER, ET AL.

**ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-206 and 76-381

LENA ROSA K. CONLEY, PETITIONER

v.

ESSIE B. SAWYER, ET AL.

***ON PETITIONS FOR WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT***

MEMORANDUM FOR THE RESPONDENTS

Petitioner, a former federal employee, seeks review of the court of appeals' affirmance of the dismissal of four different actions brought against officials of the Civil Service Commission, the Department of State, and the Navy.

1. In No. 76-206, and as one of her contentions in No. 76-381, petitioner challenges the dismissals of her libel actions against respondents Sawyer (No. 76-206 Pet. 5) and Wilson (No. 76-381 Pet. 3, 7) on the ground of absolute immunity. In Civil Action 75-367-N, petitioner originally filed suit in state court seeking damages for libel, alleging that respondent Sawyer, secretary to the Personnel Officer at the Naval Supply Center, had made false and libelous statements during an administrative review of petitioner's performance evaluation, which

had been placed in petitioner's personnel file. The statements were respondent Sawyer's recollection of what had happened during a December 1971 meeting regarding petitioner (see No. 76-206 Pet. App. A-5).

The case was removed to the United States District Court for the Eastern District of Virginia, and the district court granted respondent's motion for summary judgment. Assuming that the statement was libelous (an assumption the court found "tenuous at best"), the court ruled that the respondent was acting within the scope of her duties in making the statement and held that "statements, made by government employees acting within the scope of their duties, are accorded an absolute privilege from civil defamation suits. *Barr v. Matteo*, 360 U.S. 564, 574 (1959)" (*id.* at A-18).

In Civil Action No. 74-575-N (No. 76-381 Pet. App. A-3), petitioner filed a libel action in the same district court against Frances M. Wilson, the Executive Director of the Bureau of Economics and Business Affairs of the Department of State, for an alleged defamatory statement made in an affidavit which concerned petitioner's work history (see *id.* at A-6). The district court granted respondent's motion to dismiss (*id.* at A-7), on the ground that government officials have an absolute immunity for statements made by them within the line of duty.

The cases were consolidated on appeal and the court of appeals affirmed, holding that "the allegedly libelous statements were clearly in the line of the [respondents'] duty, and thus enjoy absolute immunity. *Barr v. Matteo*, [*supra*]" (No. 76-206 Pet. App. A-25; No. 76-381 Pet. App. A-19).

2. The decision by the court of appeals is correct. Notwithstanding subsequent decisions of this Court concerning the immunity available to state officials sued under

42 U.S.C. 1983, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, and *Wood v. Strickland*, 420 U.S. 308, *Barr v. Matteo*, *supra*, stands for the general rule that federal government officials charged with damaging reputations during their performance of duties are protected from damage suits by absolute immunity. That principle is fully applicable to the cases here, both of which involve claims for alleged libel by officials who, the court of appeals found, were acting within their line of duty.

However, the government is filing a petition for a writ of certiorari in *Economou v. U.S. Dept. of Agriculture*, 535 F. 2d 688 (C.A. 2), that presents related questions concerning the immunity of federal government officials from damage suits based upon acts done as part of their official duties.¹ In *Economou* the Second Circuit held that federal officials sued for damages based upon their performance of official duties in connection with administrative enforcement proceedings have only a qualified, not an absolute, immunity. As we explain in our petition, the court of appeals in *Economou* believed (erroneously, we submit), that cases such as *Scheuer* and *Wood* had overruled or limited *Barr sub silentio*.

Both the factual setting of *Economou* and the specific question presented in our petition in that case are different from the facts and questions presented in the cases here. Nevertheless, the continuing validity of *Barr* has been called into question by the court of appeals in *Economou*. In view of the interrelatedness of the issues in *Economou*

¹Petitioner is being furnished with a copy of our petition in *Economou*.

and these cases, the court may deem it appropriate to hold these petitions pending its disposition of *Economou*.

3. There is no reason, however, to review the other contentions petitioner advances in No. 76-381.

a. In Civil Action 74-100-N (No. 76-381 Pet. App. A-1), petitioner alleged that the Civil Service Commission acted in an arbitrary and capricious manner when it refused to hear her administrative challenge to an allegedly improper personnel action on the grounds that it had not been timely filed (*id.* at A-7). Petitioner alleged that she had been coerced into resigning from her civilian position with the Navy on July 13, 1973. Her appeal, however, was not filed until April 20, 1974, nine months late (*id.* at A-5).

The Commission dismissed her appeal on the ground that 5 C.F.R. 752.204(a) required that an appeal following termination be filed "not later than 15 days after the adverse action has been effected" (see No. 76-381 Pet. App. A-5 to A-6, A-9 to A-10).² While 5 C.F.R. 752.204(b)³ gave the Commission discretion to waive the fifteen-day rule, the Regional Board and, on appeal, the Board of Appeals held that petitioner had not provided a sufficient reason for doing so (No. 76-381 Pet. App. A-6).

The district court held that, in dismissing petitioner's administrative action, the Commission had acted in accord with the above regulations, and that its action was therefore not arbitrary or capricious (*id.* at A-10). The court also held that due process did not prohibit the setting of such

² 5 C.F.R. 752.204(a) is now found at 5 C.F.R. 752.203(a). See 39 Fed. Reg. 32542 (September 9, 1974).

³ 5 C.F.R. 752.204(b) is now found in 5 C.F.R. 752.203(a). See 39 Fed. Reg. 32542 (September 9, 1974).

a time limit, and did not require petitioner to be notified that such a time limit existed (*id.* at A-10 to A-11). The court of appeals affirmed (*id.* at A-17 to A-18).

The decision below is correct and there is no need for further review. The tribunals that have considered petitioner's claim have all agreed that petitioner did not file her administrative claim within fifteen days of the alleged adverse action (*id.* at A-9), and thus, that her appeal was not timely. 5 C.F.R. 752.204(a). Discretion to waive the fifteen-day rule is vested in the Civil Service Commission. 5 C.F.R. 752.204(b). In accordance with this discretion, the Commission fully considered petitioner's reasons for filing a late claim and found those reasons to be without merit (No. 76-381 Pet. App. A-10). Petitioner has not alleged a reason for concluding that the Commission abused its discretion. Cf. *Rogers v. Hodges*, 297 F. 2d 435 (C.A. D.C.), certiorari denied, 369 U.S. 850. Furthermore, as the district court below correctly observed, there is no constitutional infirmity in placing time restrictions on the pursuit of administrative claims (see No. 76-381 Pet. App. A-10 to A-11).

b. In Civil Action 74-449-N (No. 76-381 Pet. App. A-12), petitioner sued four federal employees, alleging that they had coerced her into resigning. This was the same personnel action that was the subject of the administrative challenge that was dismissed as untimely (see part 3.a., *supra*). Asserting that jurisdiction for her claim was conferred by 28 U.S.C. 1331 and 1361, petitioner sought reinstatement and back pay of approximately \$15,000.00.

The district court, treating petitioner's complaint as if it had been properly pleaded under the Tucker Act, 28 U.S.C. 1346(a)(2), dismissed the action on the ground that petitioner had failed to exhaust her administrative remedies (No. 76-381 Pet. App. A-13). Petitioner had not

exhausted her administrative remedies since, as noted above (pp. 4, 5, *supra*), she failed to initiate her administrative appeal within the required fifteen-day time limit, and could not satisfy the Commission that valid reasons existed for such failure. The court of appeals affirmed the dismissal of petitioner's action (*id.* at A-18).

Petitioner's failure to file a timely appeal with the Civil Service Commission constituted a failure to exhaust her administrative remedies. See *Gernand v. United States*, 412 F. 2d 1190 (Ct. Cl.), certiorari denied, 414 U.S. 844. It is well settled, as the district court held (No. 76-381 Pet. App. A-13), that "the failure of an employee of the Federal government to exhaust his administrative remedies prevents him from litigating the issue in the Federal courts." See *Beale v. Blount*, 461 F. 2d 1133 (C.A. 5); *Gernand v. United States*, *supra*; cf. *Macauley v. Waterman S.S. Corp.*, 327 U.S. 540, 543, citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 50-51. The district court correctly dismissed her suit.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.